

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

In re:)	
)	Bankr. No. 92-40226
RKF TRUCK LINES LIMITED)	Chapter 11
)	
Employer's Tax ID 46-0417329)	MEMORANDUM OF DECISION RE:
)	MOTION TO DISMISS OR CONVERT
Debtor.)	

The matter before the Court is the United States Trustee's Motion to Dismiss or Convert to Chapter Seven and Debtor's objection thereto. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum Decision and accompanying Order shall constitute findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that this case should be converted to a Chapter 7 proceeding.

I.

RKF Truck Lines Limited filed a Chapter 11 petition on March 31, 1992. The corporation is owned solely by Robert L. Harrison. In its schedules, Debtor stated it owned one parcel of real property that was totally encumbered. Debtor further stated that all personal property, except four Ford truck tractors and four Fruehauf trailers, was held in a Canadian receivership. The personal property also was fully encumbered. Debtor scheduled several secured creditors, many priority unsecured creditors, and many more non priority unsecured creditors. The United States Trustee's office was unable to appoint a committee of unsecured claim holders.

On April 8, 1992, the Court¹ approved a stipulation between

¹ The Hon. Peder K. Ecker, presiding.

Debtor and First National Bank in Brookings. The Bank, who already had a secured interest in Debtor's real estate, inventory, truck tractors, trailers, auto, shop equipment, accounts receivable, and other chattels and general intangibles, was given *inter alia* a priority claim over other administrative expenses, excluding Debtor's attorney's fees, a junior lien on property already secured, and the right to have prepetition accrued receivables applied against one of its claims. In exchange, the Bank offered Debtor post-petition financing and it gave Debtor's attorney a \$20,000.00 letter of credit to guarantee payment of his fees and expenses.

By Orders entered January 13, 14, and 19, 1993, the Court approved the Debtor's proposed sales of essentially all its real and personal property. Debtor's exclusivity period for filing a plan and disclosure statement was extended several times.

Between June 21 and June 24, 1993, Debtor commenced several similar adversary proceedings trying to collect on accounts. In *Debtor v. Northdale Enterprises, Ltd., et al.*, Adversary No. 93-4038, for example, Debtor argued that an affiliated Canadian corporation of the same name or its receiver had collected debts owed to Debtor. The Canadian receiver finally answered the complaints on February 6, 1995. It affirmatively defends that it is entitled to set off any debts collected since Debtor owes it more than it has collected. Further action in these proceedings is awaiting the outcome of this Motion to Dismiss. One adversary proceeding has been dismissed.

On February 22, 1995, the United States Trustee filed a Motion

to Dismiss or Convert to Chapter 7 on the grounds that: (1) Debtor has not operated as a business since August 1992; (2) the only remaining assets are the claims that Debtor is trying to recover from the Canadian receiver; and (3) Debtor had failed to file required reports and pay quarterly fees timely. Debtor answered on March 20, 1995 that the defaults on the fees and reports would be cured soon. It admitted that it no longer operated as a business and had sold its assets.

A hearing was held March 28, 1995. Appearances included Bruce J. Gering for the United States Trustee, J. Bruce Blake for Debtor, Robert E. Hayes for First National Bank of Brookings, and John C. Quaintance for Plaintiff-Debtor. Attorney Gering reported Debtor had or soon would file all required reports and pay all required quarterly fees but he argued the case should be dismissed regardless because the business is no longer operating and because there is little chance of recovery for the unsecured creditors. Attorneys Blake and Quaintance argued the case should be continued so that the Court could retain jurisdiction over the adversary proceedings. Attorney Hayes reiterated that First National Bank had an agreement with Debtor to guarantee Debtor's attorney's fees up to \$20,000.00. The Court took the matter under advisement.

II.

A Chapter 11 case may be converted or dismissed for cause. Cause may include, but is not limited to,

- (1) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation;
- (2) inability to effectuate a plan;
- (3) unreasonable delay by the debtor that is prejudicial to

creditors;

(4) failure to propose a plan under section 1121 of this title within any time fixed by the court; . . . or

(10) nonpayment of any fees or charges required under chapter 123 of title 28.

11 U.S.C. § 1112(b) (in pertinent part). A determination of cause is within the discretion of the Court upon consideration of all circumstances. *In re Sheehan*, 58 B.R. 296, 299 (Bankr. D.S.D. 1986). Cause for dismissing a Chapter 11 case may include a debtor's inability to reorganize timely. *In re Kerr*, 908 F.2d 400, 404 (8th Cir. 1990), see also *United States Savings Association v. Timbers of Inwood Forest, Ltd.* (*In re Timbers of Inwood Forest, Ltd.*), 108 S.Ct. 626, 632-33 (1988).

The movant has the burden to establish cause. *Sheehan*, 58 B.R. at 299.

The movant may meet his burden [to establish cause] by showing the debtor will not be able to generate sufficient income to fund a plan or that reorganization will not improve a debtor's income generation. [Citations omitted.] Once the movant has met his initial burden, the burden may shift to the debtor to demonstrate "that [he has] at least some chance of achieving every stage of [his reorganization] proposal."

In re Travis, Bankr. No. 90-10094, slip op. at 4 (Bankr. D.S.D. April 5, 1991) (quoting *In re Minnesota Alpha Foundation*, 122 B.R. 89, 94 (Bankr. D. Minn. 1990)).

III.

Upon consideration of the facts and the application of § 1112(b), the Court concludes that this case should be converted to a Chapter 7 proceeding. There is no likelihood that Debtor can reorganize. The case has been pending for over three years with no payments to creditors. Most important, a Chapter 7 trustee can

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analyze whether it is appropriate for the adversary proceedings to continue, that is, whether the Defendants have legitimate setoff claims. If the trustee determines that the adversaries should go forward,² the trustee also can work with counsel for First National Bank of Brookings to determine how Debtor-Plaintiff's counsel should be compensated. But for the fact that it has been difficult to get jurisdiction over the adversary defendants, this case and the related adversary proceedings would be dismissed. Finally, any task Attorney Blake would perform for the bankruptcy estate after the adversaries are resolved can be performed by a Chapter 7 trustee, including the appropriate distribution of the estate funds on hand.

An order shall be entered converting this case to a Chapter 7 proceeding.

So ordered this 7 day of June, 1995.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to all parties in interest set forth on the attached service list

U.S. Bankruptcy Clerk
District of South Dakota

By: [Signature]
Date: 6-7-95

ATTEST:

PATRICIA A. JOHNSON, ACTING CLERK

[Signature]
Deputy Clerk

BY THE COURT:

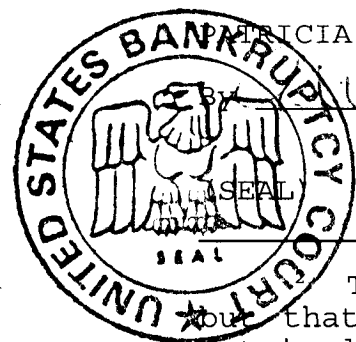
[Signature]
Irvin N. Hoyt
Chief Bankruptcy Judge

NOTICE OF ENTRY
Under Fed Bankr.P. 9022(a)
Entered

JUN 07 1995

Clerk
U.S. Bankruptcy Court, District of S.D.

The trustee also may recommend that the case be dismissed that federal jurisdiction over the adversary proceedings be retained. See, e.g., *Porges v. Gruntal & Company, Inc.* (In re *Porges*), 44 F.3d 159, 162-63 (2nd Cir. 1995) (cites therein).



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Total notices mailed: 8

Debtor RKF Truck Lines Limited, c/o 1st National Bank, Box 5057, Brookings, SD 57006
Aty Blake, J. Bruce #201, 505 W. 9th St., Sioux Falls, SD 57104-3698
Aty Quaintance, John C. PO Box 2208, Sioux Falls, SD 57101-2208
Aty Entwistle, Rick 310 S. First Ave., Sioux Falls, SD 57102-0898
Aty Gaumer, Craig PO Box 1073, Sioux Falls, SD 57101
Aty Hayes, Robert E. PO Box 1030, Sioux Falls, SD 57101-1030
Aty Matthews, Acie W. #801, 141 N. Main Ave., Sioux Falls, SD 57102
Intereste U.S. Trustee, Shrivvers Square, Suite 502, 230 S. Phillips Avenue, Sioux Falls, SD 57102